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04 April 2013

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Williams, Alexander and Phillipson, Gavin (2011) 'Horizontal effect and the constitutional constraint.', *Modern law review.*, 74 (6). pp. 878-910.

Further information on publisher's website:

<http://dx.doi.org/10.1111/j.1468-2230.2011.00876.x>

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Horizontal Effect and the Constitutional Constraint

Gavin Phillipson and Alexander Williams*

INTRODUCTION

Over a decade after the entry into force of the Human Rights Act 1998 (HRA), it is a remarkable fact that the judges have failed to reach a consensus on the nature and extent of the courts' duty to give horizontal effect to European Convention rights in domestic common law.¹ Academic writers similarly seem unable to agree. This article draws on the insights generated by the substantial academic debate so far to offer a new view of the courts' duty – the 'constitutional constraint' model – and to defend it against views which we believe to be mistaken and which have not yet been fully considered by courts and academic writers.² The model can be summarised in a single proposition: the courts must develop the common law compatibly with the Convention, but only where such development can be achieved by 'incremental' development. Our approach in propounding this model offers something new because it analyses both the HRA and the

*Respectively, Professor and Lecturer in Law, Durham Law School, University of Durham. Earlier versions of this paper were delivered by Phillipson at *Obligations V: Rights and Private Law*, St Anne's College, Oxford, 14-17 July 2010 and by Williams at the SLS Annual Conference at Southampton University, 14 September 2010. We are grateful to the participants in both conferences for many helpful comments. We have both benefited enormously from discussions with David Hoffman and Alison Young on this topic generally and, in particular, in relation to the 'three levels' of horizontal effect we propose here. The latter is an idea that Phillipson has also briefly expounded, with Young and Hoffman, in the Introduction to D. Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge: CUP, 2011, forthcoming) at 000 (hereafter 'Hoffman'). Many thanks to Roger Masterman for his very helpful suggestions on an earlier draft, and also to the anonymous referees, whose comments enabled us to improve the piece substantially. The usual disclaimer applies.

¹ The absence of a judicial consensus and the wide range of views expressed by members of the judiciary on point are now too well known to require evidencing here. For analyses and critique, see G. Phillipson, 'Clarity postponed: horizontal effect after *Campbell*' in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: CUP, 2007); and G. 'Phillipson, 'Privacy and Breach of Confidence: the Clearest Case of Horizontal Effect?' in Hoffman, above.

² We do not address the related issue of 'statutory' horizontal effect arising as a result of the courts' interpretive obligation under s 3 HRA (see e.g. *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634 [57(2)]).

Convention rights in the context of underlying constitutional principles, rather than, as previous articles have done, in isolation from this broader normative backdrop. The model also avoids the weakness inherent in seeking to draw support from ministerial statements made during the passage of the Human Rights Bill through Parliament, something that has left other models open to criticism.³ Our approach is predominantly normative and analytical, drawing on the broader doctrinal framework set by Strasbourg and the HRA; but our model also squares with what we view as the courts' instinctive approach to the horizontal effect issue to date: while judges have made significant and creative use of the Convention in private common law, they have nevertheless proceeded step by step, without either creating brand new Convention-based causes of action or instantaneously fashioning existing ones into compatibility.⁴

The article proceeds in four main steps. Part A sketches the basic legal issues and the academic debate so far, and explains why it considers that stronger models of horizontal effect, including the outlying position known as 'full' horizontal effect, are unsustainable. Part B introduces the constitutional constraint model and defends it by reference to some core features of the HRA and constitutional principles. Part C considers the horizontal applicability of the Convention rights themselves and makes two distinct arguments: first, that the practical potential for such applicability is more limited than many have argued and/or already catered for in domestic law; and second, that any obligation to apply the most significant rights in this context manifests itself in practice as an obligation to apply only Convention *principles*, since the more concrete rules derive from the Strasbourg *case-law* and therefore remain non-binding. This

³ J. Morgan, 'Questioning the "true effect" of the Human Rights Act' (2002) 22 LS 259, 260-61; S. Pattinson and D. Beyleveld, 'Horizontal applicability and horizontal effect' (2002) 118 LQR 623, 664.

⁴ For the most recent analysis, see Phillipson, 'Privacy and Breach of Confidence', n 1 above.

significant distinction – between the force and effect of the Convention rights themselves, on the one hand, and their associated jurisprudence, on the other – has been neglected in the academic debate thus far. Finally, the article goes on to expound the constitutional constraint model, explaining more fully the meaning of ‘incrementalism’ and the effect of the model on the critical issue of common law precedent.

A. THE DEBATE SO FAR: DISPOSING OF OVERLY STRONG MODELS

Some key distinctions and a summary of the debate

The crucial distinction between ‘direct’ and ‘indirect’ horizontal effect should be clarified at the outset. As Stephen Gardbaum has observed,⁵ rights take ‘direct’ horizontal effect if they are vindicated by a cause of action vested against private *persons*. ‘Indirectly’ horizontal rights, by contrast, apply not to *persons* but only to *existing law*. Section 6(1) HRA merely states that ‘It is unlawful for a *public authority* to act in a way which is incompatible with a Convention right’ in domestic law.⁶ On its face therefore, the Act excludes the direct horizontal effect of Convention rights against private bodies such as newspapers, landlords and employers, because such bodies are not themselves bound by the Act to respect those rights.⁷ The courts themselves *are* public authorities however,⁸ and therefore are bound to comply with the Convention – even, seemingly, when developing the common law in disputes between private parties. Thus the HRA appears to envisage *some*, albeit indirect, role for Convention rights in

⁵ S. Gardbaum, ‘Where the (state) action is’ (2006) IJCL 760, 764.

⁶ Emphasis added.

⁷ M. Hunt, ‘The “horizontal effect” of the Human Rights Act’ [1998] PL 423, asserts that this is clear beyond argument (at 428).

⁸ HRA, s 6(3)(a).

common law litigation between private parties,⁹ although the bare text of the Act leaves the extent of this role unclear: no provisions deal explicitly with the application of the rights to private law, while the common law goes wholly unmentioned. Those who believe the HRA to place an unlimited duty on the courts to develop the common law so as to give effect to the Convention espouse what is usually termed ‘full’ indirect horizontal effect. ‘Direct’ and ‘full’ horizontal effect are thus conceptually distinct legal mechanisms, even though they achieve the same results – new rights-based causes of action against private individuals – in practice, and even though they are often referred to interchangeably by commentators.

In the academic debate so far, Sir William Wade has advocated full indirect horizontal effect, arguing that the courts’ duties as public authorities require them, if necessary, to fashion brand new rights-based causes of action between private individuals to ensure that their Convention rights are fully vindicated in the common law.¹⁰ Despite some apparent flirtation with this view,¹¹ the judges have not accepted it as a general theory and at times have firmly rejected it;¹² it has also been thoroughly debunked on numerous occasions by commentators.¹³ The contrary view of denying

⁹ This is evidenced by the rejection by Parliament of an amendment to the Human Rights Bill put forward by Lord Wakeham, which would have had the effect of excluding the courts from the definition of ‘public authority’ when ‘the parties to the proceedings before it did not include any public authority’ (HL Deb vol 583 col 771 24 Nov 1997).

¹⁰ W. Wade, ‘Horizons of horizontality’ (2000) 116 LQR 217. Other defenders of this position are Morgan, n 3 above, and ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ [2003] CLJ 444; Beyleveld and Pattinson, n 3 above. The views of Morgan and Beyleveld and Pattinson are considered separately below.

¹¹ *McKennit v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [10]-[11]; *Re S (A Child)* [2005] 1 AC 593, [23] (Lord Steyn); *Murray v Express Newspapers*, [2008] EWCA Civ 446, [2009] Ch 481 at [27]. Some commentators have argued that such decisions evince acceptance of ‘full’ horizontal effect; see N. Moreham, ‘Privacy and horizontality: relegating the common law’ (2007) 123 LQR 373; T. Bennett, ‘Horizontality’s new horizons- re-examining horizontal effect: privacy, defamation and the Human Rights Act’ (2010) 21(3) *Ent LR* 96 (Part 1) and 145 (Part 2). For a critical response, see Phillipson, ‘Privacy and Breach of Confidence’ in Hoffman, above.

¹² *Douglas v Hello! Ltd (No. 6)* [2006] QB 125, [50] (Lord Phillips MR); *Campbell v MGN* [2004] 2 WLR 1232, [2004] 2 AC 457, [132] (Baroness Hale).

¹³ See e.g. Hunt, n 7 above, and Phillipson, n 18 below.

any horizontal effect at all¹⁴ has found no academic or judicial support,¹⁵ some of which has gathered instead around the view advanced by Murray Hunt.¹⁶ Hunt argued for what he termed ‘strong indirect’ horizontal effect, under which the courts are not required to create new causes of action immediately, but have an absolute duty to develop all *existing* common law compatibly with the Convention. One of us has previously argued for a weaker model that has also received some judicial support;¹⁷ this requires the courts only to *take account* of Convention principles when engaging in common law adjudication, affording them a variable weight depending on the context.¹⁸ Crucially, this model allows *common law and constitutional principles*, as well as the express qualifications contained in qualified Convention rights themselves, to prevail over the rights. As will become apparent, the ‘constitutional constraint’ model draws from, but sits between, these two more moderate interpretations of the HRA’s horizontal effect.

Disposing of full/direct horizontal effect models

Deryck Beyleveld and Shaun Pattinson have advanced the most sophisticated argument in favour of full horizontal effect,¹⁹ in an important article²⁰ that has not hitherto

¹⁴ R. Buxton, ‘The Human Rights Act and Private Law’ (2000) 116 LQR 48.

¹⁵ Such a view was disapproved of by Butler-Sloss P in *Venables and another v. News Group Newspapers* [2001] 1 All ER 908, 916; see also the approach taken in *Campbell*, n 12 above.

¹⁶ Hunt, n 7 above. A similar view was taken by A. Lester and D. Pannick: ‘The Impact of the Human Rights Act on Private Law: The Knight’s Move’ (2000) 116 LQR 380, and J. Beatson and S. Grosz: ‘Horizontality: A Footnote’ (2000) 116 LQR 385. For judicial support, see *Douglas v Hello!* [2001] QB 967, 998 (Sedley LJ); *Campbell*, n 12 above, [132] (Baroness Hale); *Douglas v Hello (No. 6)*, n 12 above.

¹⁷ E.g. *Campbell*, n 12 above, [17] and [18] (Lord Nicholls); *Douglas v Hello!*, *ibid*, 993-94 (Brooke LJ) and 1012 (Keene LJ).

¹⁸ G. Phillipson, ‘The Human Rights Act, “Horizontal Effect” and the Common Law: a Bang or a Whimper?’ (1999) 62 MLR 824.

¹⁹ Morgan, n 3 above, has also defended this viewpoint; we deal with his points below, at 000-000 and 000-000.

²⁰ Beyleveld and Pattinson, n 3 above.

received a proper reply. We deal below with their arguments as they bear on the interpretation of the HRA.²¹ The more important and distinctive part of their analysis, however, concerns the Convention rights themselves. The authors begin by helpfully distinguishing horizontal ‘applicability’ from horizontal ‘effect’: the former is conceptual and involves determining the correct scope of the rights; the latter is the practical effect that such application may be given in law, either domestic or international. Their contention, in essence, is (a) that all, or nearly all,²² of the Convention rights are in principle horizontally *applicable*; (b) that this jurisprudential truth has been obscured because the rights cannot be given effect in this way by the Strasbourg Court because of the design of the Strasbourg system (in which only states may be defendants); but (c) that the HRA can and should be (re-)interpreted in order to give this horizontal applicability practical *effect* in UK law.²³

We doubt at the outset that this thesis can be meaningfully addressed to the UK courts as a practical solution to the horizontal effect conundrum. As seen below, domestic courts take the view that the meaning of the Convention must be set by Strasbourg, certainly in its fundamentals;²⁴ and the Beyleveld-Pattinson thesis, if accepted, would amount to a revolution in understanding the scope and meaning of the Convention rights, which have only ever been conceptualised as applicable against *states* in Strasbourg’s eyes. Hence, the UK courts would not regard the argument as one that they could properly accept and apply, even if they considered it theoretically sound. In this sense therefore, the argument simply gains no purchase on the domestic horizontal effect debate and cannot determine its outcome: it would need to be

²¹ See 000-000.

²² We assume that the authors would agree with our argument (below, 000-000) that at least some articles (e.g. Article 7) are not horizontally applicable.

²³ It is the third stage of this argument that we consider below.

²⁴ See e.g. *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham).

addressed to Strasbourg. And since at Strasbourg only states can be defendants, so the Strasbourg Court can only conceptualise the horizontal applicability of Convention rights as deriving from the positive obligations of states,²⁵ it would seem that the Beyleveld-Pattinson thesis simply cannot find a home. However, we do not rest simply on this practical rejoinder, but also take issue with the thesis on its own terms.²⁶

One of the key arguments of their thesis is that Arts 8-11 qualify the enjoyment by individuals of their *prima facie* Convention rights by reference to the 'rights of others'. Since this allows the Convention rights of some individuals to restrict the Convention rights of others, it follows, in the authors' view, that *the rights must be applicable between private individuals*.²⁷ But there is surely a much more plausible interpretation of 'the rights of others' exception in paragraph 2 of Arts 8-11: it signifies *not* that Convention rights bind private actors, but simply that the state may legitimately intervene in order to prevent the exercise of one person's rights from interfering with *the enjoyment of* another's. In common parlance we may speak (for example) of a newspaper 'violating X's right to privacy', and judges have also used this kind of language on occasion,²⁸ but the more jurisprudentially accurate way to express this is to say that a newspaper can *interfere with the interests protected by* this right. As far as the Convention is concerned, it is only the state that can actually *violate* the right to privacy, by failing to provide a remedy to protect the individual.²⁹ In Hohfeldian

²⁵ See D.J. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford: OUP, 2nd ed, 2009), 20.

²⁶ What follows is not an exhaustive reply to all the arguments made by the authors, which would require a full-length article in itself.

²⁷ Beyleveld and Pattinson, n 3 above, at 626-27.

²⁸ See e.g. Eady J at various points in *Mosley v MGN* [2008] EWHC 1777 (QB) [2008] EMLR 20.

²⁹ The position is mirrored under the HRA: newspapers cannot violate Article 8 itself, since newspapers have no duty under the HRA not to violate others' rights – only courts do under s 6.

terms,³⁰ the state has a *power* to restrict the exercise of Convention rights on specified grounds, and therefore individuals are *liable* to have their rights restricted. Even where Strasbourg has found that in particular instances the state has a *duty* to intervene in private relations, this at best gives individuals a correlative right against the state – *not* other individuals – should it fail to do so. Thus, the duty of states to restrict rights to protect those of others – which we fully accept – does not lead to the conclusion that the Convention rights apply horizontally.

Beyleveld and Pattinson's strongest argument appears to lie with the opening words of Article 10(2), which provides that the exercise of freedom of expression, since it 'carries with it duties and responsibilities', may be subject to the limitations it then sets out, such as the protection of the rights and freedoms of others. They argue that these words imply that individuals have a duty not to interfere with other people's Convention rights, that this necessarily recognises those rights to be binding on all those exercising free expression rights, and thus that Convention rights are horizontally applicable.³¹ The better reading of this mention of the 'duties and responsibilities' of speakers is not that it *creates* legal duties on speakers not to interfere with the Convention rights of others; rather it simply *recognises* the fact that, at the time the Convention was drafted, the domestic law of the various contracting states *already* laid numerous duties on speakers, including, for example, duties not to defame others, invade their privacy, or infringe their copyrights. Thus, we suggest that the much more plausible meaning of the phrase in question is this: Article 10, because it recognises that speakers have *pre-existing* duties and responsibilities when exercising their right to free

³⁰ W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16.

³¹ n 3 above, at 629-30.

speech, grants the *state* the right to intervene to restrict one person's expression in order to protect other people's corresponding rights.

What of the argument that private individuals have a duty to respect the Article 10 rights of others (which could show that at least Article 10 rights are horizontally applicable)? True it is that Strasbourg has made numerous findings that national courts can violate Article 10 by awarding excessive damages³² or disproportionate injunctive relief,³³ even where such orders were made in private litigation. Once again, however, this does not establish that private individuals are bound by the Article 10 rights of speakers. The violation comes instead from the *courts*, which are part of the apparatus of the state; it is obvious that courts can directly violate people's free speech rights through the orders they make, just as they can violate Article 6 by conducting an unfair trial. But the fact that an interim injunction that violates Article 10 occurs in the context of private litigation is of no more significance in this respect than the fact that an unfair trial occurs in the context, say, of a contractual dispute between two individuals. It remains the case that the Convention right in question binds the state (here represented by its courts), *not* the other individuals involved in the litigation.³⁴

Finally, it may be noted that the actual approach of the Strasbourg Court – a pragmatic, case-by-case assessment of the potential for positive obligations in different Convention rights, rather than the adoption of any 'general theory'³⁵ – is far from the

³² As in e.g. *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442.

³³ As in e.g. *Plon (Société) v France* No. 58148/00, 18 May 2004.

³⁴ The HRA, s 12(4) recognises the above argument by giving the courts a clear statutory instruction that Article 10 is to be taken into account whenever a court order would interfere with that right.

³⁵ For a recent denial of the desirability of developing any such theory see *VgT Verein gegen Tierfabriken v Switzerland*, (App no 24699/94) (2002) 34 EHRR 4, [46]. See also *X and Y v The Netherlands* (1986) 8 EHRR 235, at [23]; *Plattform 'Ärzte für das Leben'* (1991) 13 EHRR 204, [32]; *Myzsk v Poland* (App no 28244/95) (1998) 26 EHRR CD 76, CD 78. For critique, see I. Hare, 'Vertically Challenged: Private Parties, Privacy and the Human Rights Act' [2001] EHRLR 526, 536 and the references in M. Colvin (ed) *Developing Key Privacy Rights* (Oxford: Hart, 2002), 22-

blanket horizontality contended for by Beyleveld and Pattinson. And this more pragmatic approach has also found favour elsewhere,³⁶ particularly in German constitutional law, which is perhaps the jurisdiction with the most sophisticated and developed doctrine of horizontal effect (*drittwirkung*).³⁷

To conclude, we do not agree that the Convention rights are automatically horizontally applicable and therefore that they must necessarily take full horizontal effect in domestic law. But it is beyond doubt that they still generate some level of horizontal *effect*. It is clear that private bodies can adversely affect an individual's enjoyment of at least some of their rights,³⁸ for example by invading a person's privacy through intrusive photography. Hence the state's positive obligation to provide legal protection against such interference. This obligation is then translated, via s 6 HRA, into the developmental obligation of domestic courts, which is designed to provide remedies for such interference. This is what a duty to give Convention rights 'horizontal effect' in domestic common law entails.

The 'radical distortion' model

In her sophisticated seven-model typology of indirect horizontal effect, Alison Young discusses what she refers to as 'model (E)'.³⁹ This prohibits the courts from creating new causes of action, but otherwise imposes an absolute obligation to render existing

23; I. Leigh and R. Masterman, *Making Rights Real: the Human Rights Act in its First Decade* (Oxford: Hart, 2008), 631 also note the lack of any general approach.

³⁶ See e.g. the comments of Madala J in *Du Plessis v De Klerk* in South Africa 1996 (3) SA 850, 935ff.

³⁷ See G. Taylor, 'The horizontal effect of human rights provisions', the German model and its applicability to common-law jurisdictions' (2002) 13 KCLJ 187.

³⁸ The differential potential of the Convention rights for horizontal effect is discussed in Section C below.

³⁹ 'Horizontality and the Human Rights Act 1998', in K. Ziegler (ed.), *Human Rights and Private Law: Privacy as Autonomy* (Oxford: Hart, 2007) 35. Young's models are labelled (A) to (G) in ascending order of strength. We consider her remaining models below.

ones Convention-compatible. Young claims that this model corresponds to Murray Hunt's model of strong indirect effect.⁴⁰ We doubt in fact whether Hunt's strong indirect model is best read as standing for this idea, as we explain below. But commentators generally appear to believe that it was,⁴¹ and so for present purposes we consider model (E) as a potentially credible interpretation of the court's duty that is considerably stronger than the constitutional constraint model.

We label model (E) the 'radical distortion' model because it requires the courts to distort existing causes of action in order to bring them into line with the Convention. In our opinion it is internally incoherent and vulnerable to a significant academic critique. It is incoherent because it is too limited in a formal sense, but simultaneously too unconstrained substantively. Formally, it prevents the courts from creating new causes of action; however there is no good reason to read the HRA as ruling this out, provided such creation comes about through *incremental* development. As the recent New Zealand decision in *Hosking v Runting*⁴² illustrates, common law courts have always been able to create new causes of action. We would argue additionally that courts are *obliged* by the HRA to create new Convention-based causes of action between private individuals, provided that it amounts to the final step in a series of incremental moves in that direction. The crucial distinction is not between 'developing the existing law' and 'creating new causes of action', but between *incremental* and *legislative-style* common law development.

⁴⁰ *Ibid.*, 40.

⁴¹ See notably Morgan, n 3 above, 271; Phillipson, n 18 above, 831.

⁴² The New Zealand Court of Appeal declared the existence of a new tort of invasion of privacy, instead of following the English law route of developing breach of confidence to protect privacy. There was no obligation under the New Zealand Bill of Rights Act for such a bold move, since the Act does not incorporate Article 17, the privacy guarantee of the ICCPR. This was thus an example of 'ordinary' (albeit unusual) common law creativity.

Despite being artificially constrained *formally* however, the radical distortion model is *substantively* too unconstrained: in imposing an absolute obligation to render existing causes of action Convention-compatible, it seems to require the courts simply to over-write existing actions with new Convention-based content. As Morgan has argued, such an approach represents an implausible interpretation of the HRA because it is read as requiring great weight to be placed on the need to identify an existing cause of action in order for the courts' section 6 obligation to bite, but then obliging courts to ignore the content of that cause of action when they come to 'develop' it. The existing action thus becomes merely 'an empty shell into which any Convention right can be poured'.⁴³ If courts were really required to ensure that any cause of action argued before them immediately complied with the Convention by simply over-writing it, such a position would be substantively identical to full horizontal effect. The claimant would be able to choose an existing cause of action, almost at random, and the court would be immediately required to distort it into Convention-compatibility. As under 'full horizontal effect', the claimant could demand Convention protection in a single move.

We doubt in fact that this is the best reading of Hunt's work. As he observed, 'It is beyond argument that the Human Rights Act does not [require the creation of entirely new causes of action], but the courts will undoubtedly develop *over time* causes of action such as trespass, confidence, and copyright...'.⁴⁴ Elsewhere he concludes that the Convention applies through section 6 to 'all law',⁴⁵ whilst 'falling short of *immediately* conferring new causes of action.'⁴⁶ Assuming this to be the better reading of Hunt's work, his model would then resemble the position for which we contend: the courts are

⁴³ Morgan, n 3 above, 271.

⁴⁴ Hunt, n 7 above, 442 (emphasis added).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 424 (emphasis added).

obliged to develop the existing common law compatibly with the Convention, even if this results in the creation of new causes of action, but they must do so incrementally. As will appear below however, our model enhances this better reading of Hunt's work in three ways: it makes the requirement of incrementalism explicit; it justifies it in full, with reference to other HRA provisions and constitutional principle;⁴⁷ and it explains the limited capacity of Convention rights to function as hard-edged rights in the way Hunt appears to envisage.⁴⁸ It is to introducing that model that we now turn.

B. INTRODUCING THE CONSTITUTIONAL CONSTRAINT MODEL

Our starting point is that section 6, by expressly designating courts as public authorities bound to act compatibly with the Convention, intends at the very least to alter the pre-HRA position by requiring courts to accord a greater weight to Convention principles in private common law than they previously did. We therefore reject at the outset any interpretation of the court's duty that either envisages no horizontal effect at all, or that grants courts a mere *power* – exercisable at their discretion – to develop the common law Convention-compatibly.⁴⁹ Neither of these interpretations would represent an advance on the pre-HRA position, under which the courts *could* develop the common law compatibly with the Convention if they deemed it necessary to resolve an ambiguity, or otherwise desirable.⁵⁰

A multi-level analysis

⁴⁷ In section B.

⁴⁸ In section C.

⁴⁹ Young refers to these two positions as models (A) and (B) in her typology: see note 39 above.

⁵⁰ See e.g. *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 (CA).

The horizontal effect issue raises questions at two logically distinct levels:⁵¹ first, at the Convention level, as a matter of interpretation of the Convention rights; and second, at the local, domestic level, as a matter of interpretation of the HRA, the particular instrument giving effect to the Convention. Thus, the court must first decide whether there are any Convention obligations in play at all and second, if so, how to give effect to them in domestic law. Section 2(1) HRA provides that a court, 'in determining any question... in connection with a Convention right, must take into account' any relevant Strasbourg jurisprudence. So, when considering whether the Convention right in question has any relevance to the particular dispute before it, the court should first enquire whether Strasbourg has found that right to bear the content argued for by the claimant and to require positive state intervention between private parties.⁵² The second, domestic, level is logically distinct from the first because a court *might* decide that whilst it appeared that Strasbourg had interpreted a particular right as imposing a positive obligation to intervene between private parties, the particular provisions of the HRA precluded the courts from fulfilling this obligation through common law development, so that the UK Government would have to introduce legislation to give effect to that obligation. As Lord Hoffmann said in *Campbell v MGN*:

Although the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it

⁵¹ We draw briefly here on G. Phillipson, 'Clarity postponed', n 1 above, at 149.

⁵² As the European Court did, for example, in *A v United Kingdom* (1998) 27 EHRR 611, where it found that an obligation existed upon the state to provide protection for a child against its parents in respect of physical discipline.

does not follow that such an obligation would have any counterpart in domestic law.⁵³

In this article we seek to examine both of these levels in a more rounded way than previously attempted, and – importantly – introduce a third level of analysis, namely, background constitutional principles that can influence the interpretation of both of the first two levels. Most previous articles on this subject have not properly addressed the first level. Parts A and C do so in depth. In this part of the article, however, we concentrate chiefly on levels two and three of the analysis, seeking to construe the HRA in the light of background constitutional principles.

As stated in the Introduction, the constitutional constraint model requires the courts to develop the common law compatibly with the Convention, but only where such development can be achieved by ‘incremental’ development. We flesh out the notion of ‘incrementalism’ below,⁵⁴ but for now we use it as a shorthand term to signify the need for judges to ensure that they develop the law in a *judicial* rather than a legislative fashion; that is, on a piecemeal and principled basis that takes due account of pre-existing legal frameworks established by Parliament and previous judicial decisions.⁵⁵ Importantly, unlike the radical distortion model, ours allows for the courts to create new causes of action, and indeed implies that they may exceptionally be obliged to do so, provided that this is the end point of a *process* of incremental development.

Justifying the model I: the role of constitutional principles

⁵³ n 12 above, [49].

⁵⁴ In Section D, at 000-000.

⁵⁵ We articulate and defend this distinction below, 000-000.

The constraint of incrementalism derives from central features of the UK constitutional order. We therefore contend that the burden lies on those arguing for a stronger version of horizontal effect to show that the HRA clearly *displaces* this constraint in the private common law context. This burden, we argue, cannot be discharged: not only does the HRA show no clear ‘enacted intent’ to displace the constitutional constraint;⁵⁶ it also discloses clear positive intent to maintain it. Thus, put simply, our model derives from the two most fundamental attributes of the HRA in this context: the courts are given a duty by section 6 HRA to act compatibly with the Convention, but they are not freed by the Act from the pre-existing constraint of incrementalism.

We rely on three foundational constitutional principles as underpinning the constitutional constraint: democracy (as represented through parliamentary sovereignty), the rule of law and the separation of powers.⁵⁷ As to the first, it is clear that the courts, as unelected bodies, lack the legitimacy to engage in large-scale measures of law reform,⁵⁸ particularly where important choices must be made as to how to recognise an admittedly important general principle, such as a Convention right, within the legal system as a whole. As Bagshaw remarks, ‘a radical *judicial* revision of the [common] law... might involve substantial redistribution (of wealth or power) by an unelected body.’⁵⁹ This might seem like nothing more than a separation of powers point; however, that concept exists in constitutions that give the judiciary a far greater

⁵⁶ The term ‘enacted intent’ is Aileen Kavanagh’s and refers to intentions made explicit in the language of the statute itself; ‘un-enacted intent’ refers to those that legislators and the Bill’s promoters had, which are not themselves manifest in the language of the statute: ‘The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998’ 26(1) (2006) OJLS 179, esp. 181. We rely only on ‘enacted intent’ in our analysis.

⁵⁷ Plainly each of these concepts gives rise to a number of particular conceptions, which are contested; in invoking them, we rely on what we consider are relatively ‘thin’ and widely-shared principles, which represent a consensus amongst those who would differ on ‘thicker’, more substantive conceptions: for this terminology, see Waltzer, n 106 below.

⁵⁸ K.D. Ewing, ‘A theory of democratic adjudication: towards a representative, accountable and independent judiciary’ (2000) 38 *Alberta LR* 708, 711.

⁵⁹ ‘Tort Design and Human Rights Thinking’ in Hoffman, above (emphasis original).

creative role than does the UK, notably in the United States. We treat 'democracy' in this context as meaning the particular commitment, encapsulated by the UK's absence of a codified constitution and entrenched Bill of Rights, to allowing major legal changes, including those concerning rights, to be brought about by the legislature.⁶⁰ The limitation represented by incrementalism clearly answers to that commitment.

As to the second principle, the rule of law, amongst other things, this demands as a basic requirement that citizens be able to plan their conduct, with reasonable certainty around the law's requirements. As a panoply of distinguished legal philosophers agree,⁶¹ this principle therefore requires that law be both reasonably clear and not significantly retroactive in effect. In turn, this has important implications for judges engaged in developing the common law. As Lord Bingham recently noted, the rule of law:

'preclude[s] excessive innovation and adventurism by the judges. It is one thing to alter the law's direction of travel by a few degrees, quite another to set it off in a different direction. The one is probably foreseeable and predictable, something a prudent person would allow for, the other not...' ⁶²

In other words, the constraint of incrementalism is not simply a description of judicial conservatism; rather, since common law development raises the possibility of the retrospective application of civil liability, of unforeseeable change and thus unpredictability and uncertainty in the law, it is essential that such development avoids

⁶⁰ A classic contrasting example is the decision of the US Supreme Court in *Roe v Wade* 410 U.S. 113 (1973), which formulated, in some detail, a constitutional right to abortion.

⁶¹ See J. Raz, 'The Rule of Law and its virtue' (1977) 93 LQR 195; J. Rawls, *A Theory of Justice* (Oxford: Clarendon, 1972) 236–40; L. Fuller, *The Morality of Law* (Yale, 1964), esp. chapter 2.

⁶² Lord Bingham, 'The Rule of Law' [2007] CLJ 67, 71 (footnotes omitted).

these as far as possible. This is achieved in practice by limiting judicial change to the incremental. As Sedley LJ put it in *Douglas v Hello!*, common law development under the HRA should take place ‘without undermining the measure of certainty which is necessary to all law.’⁶³ In a seminal passage, the Strasbourg Court has declared that while law cannot be excessively rigid, and ‘must be able to keep pace with changing circumstances’:

a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁶⁴

Seen in this light, the constraint of incrementalism is not a matter of mere judicial prudence, and nor does it denote a simple lack of judicial adventurousness: rather, it constitutes an important answer to the core rule-of-law principles of legal certainty and non-retroactivity that are strongly upheld by the Convention itself.⁶⁵

As for the separation of powers, as noted above,⁶⁶ the second stage of the horizontal effect analysis requires a judge to consider whether and how the requirements of a Convention right, once identified at the first stage, should be given effect in domestic law if the right is not already protected. At this point, the issue of institutional competence inescapably arises. The court must decide whether the incompatibility it has found can be remedied by developing the common law, or

⁶³ [2001] QB 967, 998.

⁶⁴ *Sunday Times v UK* (1979-80) 2 EHRR 245, [49].

⁶⁵ See e.g. *Marckx v Belgium* (1979) 2 EHRR, at [58].

⁶⁶ At 000-000.

whether, under the criteria to be discussed below, such ‘development’ would amount to legislative-style, as opposed to judicial, law-making.⁶⁷ Under the separation of powers doctrine, the courts are generally precluded from engaging in legislative-style law reform. As Roger Masterman remarks, ‘in separation of powers terms, [the principle of incrementalism] recognises that it is primarily the constitutional function of Parliament to legislate’.⁶⁸ It is helpful to analogise this situation by reference to the choice a judge must make when confronted with an apparently incompatible statutory provision under the HRA, between remedying the incompatibility through re-interpretation under section 3(1), on the one hand, and leaving the change to Parliament as a ‘legislative-style’ amendment by issuing a declaration of incompatibility under section 4, on the other. A section 4 declaration in fact makes two announcements: first, explicitly, that the legislative provision in question is incompatible with a Convention right; and second, implicitly, that the court is not the appropriate institution to remedy the problem. This point arose particularly clearly in the now well-known decision of *Bellinger v Bellinger*.⁶⁹ In that case, the House of Lords was manifestly able to remedy the incompatibility in the statute as a matter of linguistic ‘possibility’: only a single word – ‘female’ – required re-interpretation so as to include post-operative male-female transsexuals.⁷⁰ But as Kavanagh has noted, their Lordships thought it ‘preferable to leave the issue to be reformed by Parliament, so that it [could] be done in a

⁶⁷ Bagshaw in particular suggests that there are good reasons to be sceptical about whether judge-made law is the best way of implementing the UK’s Convention obligations: Hoffman, above.

⁶⁸ R. Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: CUP, 2011) 182.

⁶⁹ [2003] 2 AC 467.

⁷⁰ G. Phillipson, ‘Deference, Discretion and Democracy in the Human Rights Act Era’ (2007) 60 CLP 40, 65; T. Hickman, ‘Constitutional Dialogue, Constitutional Theories and the HRA 1998’ [2005] PL 306, 330.

comprehensive fashion, rather than by means of piecemeal, incremental steps.’⁷¹ Masterman has commented that, ‘addressing the wider ramifications of such [a change] was felt to be beyond the constitutional competence of the court’.⁷² In other words, their Lordships read the limits of the interpretative obligation imposed by section 3(1) in the light of the limits to the judicial role prescribed by the constitutional background. While the HRA makes specific provision for this question of institutional and constitutional fitness to be considered in the context of *statutory* interpretation, it omits to do so in relation to the common law, since the latter is not expressly mentioned in the Act. But we contend that the same considerations must also bear on the limits to the courts’ creative role in this sphere, with the result that the ordinary constitutional constraint on judicial law-making remains in place. Thus, the starting presumption in interpreting the HRA is that Parliament intended, where major ‘gaps’ in common law protection for the Convention rights exist, that the solution is for *Parliament* to legislate to fill them, not for the courts to engage in purported common law ‘development’ that in reality amounts to legislation.

Justifying the model II: construing the HRA

We turn next to our arguments on the HRA itself. We have already noted the absence from that Act of explicit provisions dealing with the effect of the Convention on private common law, something that has generally been commented on simply in order to illustrate the difficulty of resolving the horizontal effect question. But there is a much more important point here. It would have been perfectly possible for the HRA to have

⁷¹ A. Kavanagh, ‘The elusive divide between interpretation and legislation under the Human Rights Act 1998’ (2004) OJLS 259, 272. In citing *Bellinger* we do not contend that the House of Lords was correct to find itself constrained *on the particular facts*, and one of us has previously argued to the contrary: Phillipson, *ibid* at 63-8. See also Hickman, *ibid*, 330-32.

⁷² Masterman, n 68 above, 165.

provided explicit guidance on this issue. A clear model existed, for example in the South African Constitution, which states in terms that private persons *may* in principle be bound by the entitlements in the Bill of Rights, depending upon the nature of the right, and that the courts *must* develop the common law to give effect to such obligations.⁷³ The absence of any such explicit provisions in the HRA provides a strong *prima facie* case that the ordinary ‘constitutional constraint’ on common law development remains, since it has not been displaced by clear statutory language. In turn this casts strong doubt on the arguments of those such as Wade, Morgan and Beyleveld and Pattinson, who argue that the HRA creates a new, *sui generis* constitutional tort, enforceable against all private individuals for breach of Convention rights. Accepting such a view entails the belief that when introducing this great constitutional innovation, the Act neglected to make any mention whatsoever of such critical matters as limitation periods, appropriate tribunals, or remedies. We would also be required to believe that the Act introduced this potentially vast sweep of liability for private bodies, *without a single mention in the text of private bodies*.⁷⁴

⁷³ S 8 provides:

...

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

⁷⁴ Save to state that institutionally private bodies *are* bound by the Convention rights when performing ‘a public function’ – the ‘hybrid public authority’ introduced by s 6(3)(b). The White Paper contained no mention of horizontal effect: *Rights Brought Home: The Human Rights Act*, Cm. 3782 (October 1997).

As is well known, the purposes of the Act, as expressed in its provisions, relate only to legislation and the liability of public authorities. Thus, the Act first provides that legislation must be interpreted compatibly with the Convention rights; second, it renders it unlawful for public authorities to act incompatibly with the rights; and third, it gives a statutory cause of action against such bodies, and provides for remedies when such unlawfulness occurs.⁷⁵ One of us has argued previously⁷⁶ that the outcome sought by direct and full horizontalists – the effective collapsing of the distinction between public and private bodies – would therefore run counter to the basic scheme of the HRA, which is to bind only public authorities and to provide procedures and remedies for this purpose.⁷⁷ Under such an outcome, the carefully worded definition of ‘public authority’ in section 6 would become largely redundant and the HRA would instead effectively bind *both* public and private bodies to follow the Convention but – with no apparent justification for the distinction – make provision for proceedings and remedies in relation only to the former.

In response to this argument, Beyleveld and Pattinson have pointed to section 11 HRA, which states that, ‘A person’s reliance on a Convention right does not restrict ... (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.’ They go on, ‘Thus, the fact that [sections 7-9] are drafted in terms of ‘public authorities’ cannot affect any legal action arising as a result of the court’s obligation under section 6(1).’⁷⁸ The implication, therefore, is that s 11 makes implicit reference to claims against private defendants. First of all, this was plainly *not*

⁷⁵ See also Lester and Pannick (n 16 above) on this point, who regard these as the key legislative purposes of the Act.

⁷⁶ Phillipson, n 18 above.

⁷⁷ Cf. Beyleveld and Pattinson (n 3 above, 634) – an argument we consider manifestly unconvincing.

⁷⁸ *Ibid.*

the apparent intention behind s 11, which evidently meant to preserve ‘other’ *non*-Convention claims, such as those in the common law. Moreover, their interpretation takes section 11 to say, in effect, ‘the fact that sections 7-9 appear in plain terms to preclude actions against private bodies for breach of Convention rights does not mean that actions against private bodies for breach of Convention rights are precluded’, a reading that is manifestly implausible.⁷⁹

This presumably deliberate omission by the HRA to provide specific guidance on horizontal effect also provides an initial answer to one of the most important criticisms made of moderate models such as ours, which require development of *existing* common law, rather than the immediate creation of new Convention-based causes of action. This argument, advanced by Morgan, is that because such models require an existing cause of action on which the section 6 duty can bite, there will inevitably be situations in which no such cause of action exists, meaning that the courts will be unable to vindicate Convention rights, placing the UK in breach of (the unincorporated) Art 13 ECHR.⁸⁰ We argue below that given the nature of the Convention rights in this context, in such situations the courts would merely be refraining from giving effect to particular Strasbourg *decisions* – which Parliament deliberately chose to make non-binding under section 2 HRA. Even if a rare case arises in which it is clear that the common law is not compliant with the bare text of a Convention right and cannot be ‘developed’ so as to achieve compliance, the rejoinder to Morgan’s concern is this: had Parliament wanted the contrary result, it could have legislated so as to give the courts an explicit role in protecting rights in the private sphere, taking, for example, the South African

⁷⁹ Beyleveld and Pattinson (*ibid*) contend unconvincingly that, ‘The Act is merely more specific with regard to actions and remedies available against public authorities....’.

⁸⁰ Morgan, n 3 above, 273. Art 13 provides that ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...’. It is not given domestic effect by the HRA: s 1(1) and Schedule 1.

constitution as a model. The fact that it did not cannot just be ignored, or papered over by academic ingenuity.

It is not just the HRA's silence on the horizontal effect issue that implies Parliament's intention to preserve the constraint of incrementalism. The positive reasons for inferring the constitutional constraint model from the HRA flow from examining the Act in its entirety and paying particular regard to section 6(6), a somewhat overlooked provision.⁸¹ Whilst Parliament has enhanced the courts' power to read legislation compatibly with the Convention through the interpretative obligation under section 3 HRA, it is nevertheless clear that it intended to safeguard its own ultimate legislative sovereignty, in the sense of retaining a residual role to decide whether and how to protect individual Convention rights, rather than simply ceding all responsibility on this point to the courts. One key piece of evidence for such an intention is the deliberate omission of Art 13 ECHR from the Articles given domestic effect by the HRA. As Hickman puts it, this 'properly limits the scope for judicial law-making and appreciates the crucial role for Parliament in protecting principle'.⁸² Another, of course, is that if primary legislation infringes the Convention, the courts must continue to apply it (section 3(2)) and allow other public authorities to enforce or act under it (ss 6(2)), even if the courts issue a declaration of incompatibility against it (section 4(6)). Moreover, section 6(3) prevents Parliament and its individual legislators from being brought to court by the victim and either compelled by injunction to remedy incompatible legislation or made to pay damages for failing to do so, since this provision, which sets out the definition of 'public authority', excludes 'either House of

⁸¹ For brief treatment, see J. Beatson *et al*, *Human Rights: Judicial Protection in the United Kingdom* (London: Sweet & Maxwell, 2008), 369-371; R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford: OUP, 2nd ed, 2009), 277-278.

⁸² Hickman, n 70 above, 333.

Parliament or a person exercising functions in connection with proceedings in Parliament’.

Enter then section 6(6) HRA, which provides that for public authorities to ‘act’ incompatibly with the Convention ‘includes a failure to act but does *not* include a failure to... (a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order.’⁸³ Section 6(6) again makes the point that neither Parliament nor its individual legislators may incur liability or suffer an injunction under section 6 for failing to legislate or initiate legislation. But it cannot simply be immunising Parliament and its legislators from an attempt by the victim of such an omission to mount a section 6 claim in court for failing to remedy Convention-incompatible legislation: this result is *already* provided for by section 6(3). Similarly, subsection (6) cannot simply be preventing the *courts*, in a dispute which is already underway, from issuing an injunction to require Parliament to remedy Convention-incompatible legislation, because this would involve the prior contention that Parliament would be acting unlawfully by failing to legislate, which is again already precluded by section 6(3). So other than simply stating the result arrived at by other HRA provisions, how can we best read section 6(6)’s purpose?

Our answer is as follows. Sections 3(2) and 4(6), when preserving Parliament’s role of deciding whether and how to protect Convention rights by enacting future legislation, only deal with situations where the Convention breach in question arises from legislation enacted by Parliament. Hence, when section 6(3) is read with those provisions to exempt Parliament for liability in court, *inter alia*, for failing to legislate, it is not abundantly clear at first that the HRA intends to preserve Parliament’s legislative role in the alternative context where a victim’s Convention rights have been infringed

⁸³ Emphasis added.

by an *absence* of legislation or *common law* deficiency. This, we suggest, is section 6(6)'s proper purpose: by preserving Parliament's freedom to decide whether and how to enact legislation to remedy Convention incompatibilities, it draws no distinction between the two contexts and therefore appears to preserve that freedom both where the breach derives from Convention-incompatible legislation (which is already covered by sections 3(2), 4(6) and 6(3)), *and* where either an absence of legislation or a common law deficiency has breached the victim's rights.⁸⁴ Hence, by virtue of section 6(6) it is *Parliament*, not the judiciary, which remains responsible for 'legislating' so as to remedy Convention breaches caused by absences of legislation or common law deficiencies.⁸⁵ This interpretation would deliver the fatal blow to the 'full/direct' and radical distortion models, precisely because they require the courts to engage in legislative-style behaviour by developing the common law without regard to its existing content – either by creating new causes of action or distorting existing ones into Convention-compatibility.

Finally, the full horizontalists do appear to recognise that their argument is a difficult one to make, given the complete absence in the HRA of any stated intention to make the rights binding in private common law and the clear division it appears to establish between the position of public and private bodies. Their final attempt to bolster their argument, therefore, is to prey in aid section 3(1) HRA, using it in a self-reflective manner. Their argument is that in order to ensure that the HRA is itself compatible with the Convention rights, the provisions of the Act must be read using section 3(1) so as to render the rights fully effective in private common law.⁸⁶ To have

⁸⁴ See *R (Rose) v Secretary of State for Health* [2002] EWHC 1593 (Admin) for tacit support for this approach.

⁸⁵ See also Lord Ackner: Hansard HL vol 583 col 812 (24 November 1997).

⁸⁶ Beyleveld and Pattinson, n 3 above, 633-634; Morgan, n 3 above, 273.

to defend a position on the interpretation of the HRA by manipulating the Act's provisions using section 3 suggests a certain weakness in that position,⁸⁷ and Lord Bingham, for one, has denied that section 3(1) applies to the HRA itself, as opposed to other statutes.⁸⁸ But even if it does apply, section 3 would surely not produce the result that full horizontalists advocate. First, it would require the courts to accept the full horizontal *applicability* of the Convention rights themselves at the first level – something we have strongly contested above. Second, even if the courts *did* accept the applicability argument, section 3 would be unable to give effect to it: it is now clearly established that domestic courts may not, when using section 3, depart 'substantially from a fundamental feature of an Act of Parliament'.⁸⁹ The strong emphasis on the liability only of *public authorities* in sections 6-9 of the Act and its striking silence on the liability of private bodies is surely such a fundamental feature. Moreover, and drawing from our section 6(6) argument above, since Parliament has emphasised at various points within the HRA the desire to maintain its sovereignty,⁹⁰ it would appear that an interpretation of section 6(1)'s horizontal effect requirements that allowed the courts to intrude into Parliament's role by 'legislating' rather than 'developing' the common law would indeed depart from a fundamental feature of the HRA and thus not represent a 'possible' reading of it.

Having thus set out our basic position and reasons for rejecting stronger models, we turn next to consider what applying 'the Convention rights' actually means in this context. Exploring this apparently simple notion will reveal why we characterise the rights as *principles* in this context, and also why we contend that stronger models, which

⁸⁷ Phillipson has been criticised by Tom Hickman for suggesting a similar reading of s 3(1) itself: Hickman, n 70 above, at note 114, something accepted on reflection as a fair point.

⁸⁸ R (*Al-Skeini*) v *Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [15(2)].

⁸⁹ *Re S and Re W* [2002] UKHL 10, [2002] 2 AC 291, [40] (Lord Nicholls).

⁹⁰ See further 000-000.

purport to impose absolute obligations on the courts to act compatibly with Convention rights in the private sphere, lack both precision and concrete content.

C. THE DIFFERENT CONVENTION RIGHTS AND THE SIGNIFICANCE OF THE RIGHTS/JURISPRUDENCE DISTINCTION

Many articles on this subject discuss the potential horizontal effect of Convention rights as if they were all of a piece, without paying proper attention to the important differences between them in this respect.⁹¹ The first part of this discussion seeks to remedy this omission by briefly considering how far each right protects interests that may be interfered with by non-state bodies. The second part brings out the crucial significance of the distinction between the bare rights themselves and their associated Strasbourg jurisprudence, a distinction which is particularly important in relation to Arts 8-11. We take these points in turn.

The different types of Convention rights

The Convention rights can be divided into three different classes for present purposes.⁹² First, there are certain rights that by their nature can only apply against the state: Article 6 (the right to fair trial) is a clear example, since only the state can organise the courts system.⁹³ Article 7, guaranteeing the non-retroactivity of criminal law, is plainly

⁹¹ See e.g. Beyleveld and Pattinson; Morgan (n 3 above); Wade (n 10 above).

⁹² We do not consider Articles 1 and 13, which are remedial rather than substantive provisions.

⁹³ One narrow exception is the possibility that the media may threaten a fair jury trial through prejudicial coverage; as with Arts 2-5 below, such a possibility is already catered for by criminal law, namely the Contempt of Court Act 1981. Article 6 can also have relevance for arbitration between two private parties; however, as the Court of Appeal has recently found, under the Strasbourg case law, parties who *agree* to arbitration are to be treated thereby as having waived

also a right that only the state can infringe, since private bodies cannot make criminal law. Second, we have the remainder of the absolute and narrowly qualified rights, Articles 2-5. In relation to these rights we contend that those which in themselves uphold clear rules – no arbitrary killing, no detention without law, no slavery and so on – since they cover extreme interferences with liberty, are highly likely *to be covered already* by existing criminal and tort law applying to individuals. Thus, the rights to be free from torture (Art 3) or arbitrary killing (Art 2) are dealt with in the various offences against the person and the law of murder and manslaughter. Even should these need adjusting in minor cases – as did the UK law of assault allowing for physical punishment of children, which was found to be under-protective of children’s Art 3 rights in *A v UK*⁹⁴ – the courts would be dealing with criminal law in such situations, and therefore not with horizontal effect. It is generally accepted that Article 4 (freedom from slavery) *does* lay duties on individuals, but criminal law, tort law and freedom of contract ensure that one individual may not subject another to slavery or forced labour anyway.⁹⁵ Article 5 prevents the detention of persons, subject to some quite specific exceptions in para 1, such as arrest on reasonable suspicion, imprisonment after conviction of an offence and detention with a view to deportation. These exceptions are fairly precise and none could apply to an individual (save perhaps for a citizen’s arrest). Thus the bare text of the Article can generate the conclusion that one individual may not detain another, but this is *already recognised* in the tort of false imprisonment and the

at least some of their rights under Art 6: see *Stretford v The Football Association Ltd* [2007] EWCA Civ 238; [2007] 2 Lloyd’s Rep 31. It appears that the right to an impartial arbiter may not be waived, but the Arbitration Act 1996 allows for challenge to or appeal from an arbiter on grounds of failure to act impartially.

⁹⁴ *A v United Kingdom*, n 52 above.

⁹⁵ Though see *Siliadin v France* (2006) 43 EHRR 16 and, in response, the Coroners and Justice Act 2009, s 71 of which introduced new offences to ensure that extreme forms of domestic servitude were covered.

crime of kidnapping. The procedural rights in Article 5,⁹⁶ it should be noted, evidently apply to state actors only.

We then come to the *generally* qualified rights, Articles 8-11,⁹⁷ which establish broad rights and allow for general restrictions on them in pursuit of a wide range of legitimate state aims, such as the prevention of crime or disorder, protection of health and morals and upholding the rights of others. Restrictions on these rights, under the exceptions in paragraph 2 of these Articles, must pursue a legitimate aim (one of the specified exceptions), be justified by a pressing social need and proportionate. These Articles *may* require intervention by a state in private relations and thus generate horizontal effect in domestic law. However, it is in relation to these rights that our second distinction, between the rights themselves and their associated jurisprudence, becomes crucial in the horizontal effect context. Much of what we say about these rights is also applicable to Article 14, the non-discrimination guarantee,⁹⁸ which is parasitic upon another Convention right being engaged rather than being a free-standing right in itself. It is most often pleaded in conjunction with Article 8,⁹⁹ and so our comments on Art 8 below also apply to Article 14.¹⁰⁰

⁹⁶ Found in sub-paras (2)-(4), including *habeas corpus*.

⁹⁷ Protecting privacy and family life (Art 8), freedom of thought, conscience and belief and religious practice (Art 9), expression (Art 10) and assembly and association (Art 11). The right to peaceful enjoyment of possessions under Protocol 1, Article 1 also falls into this category.

⁹⁸ Art 14 provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour...'

⁹⁹ As in employment situations such as *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634, in which persons are dismissed for conduct in their private life.

¹⁰⁰ It should also be noted that under the Equality Act 2010, a comprehensive statutory code covers discrimination in the provision of goods and services, employment, housing, education etc. It is unlikely that Art 14 will provide additional protection, and if particular Strasbourg decisions did, the conduit for domestic effect would be the 2010 Act, re-interpretation of which would fall to be dealt with under s 3(1) HRA as a statutory, not common law, horizontal effect situation. See the conclusions on this point in the chapter by Hazel Oliver on Discrimination Law in Hoffman (above).

Arts 8-11: the distinction between rights and Strasbourg jurisprudence

Articles 8-11 are phrased in very general terms, as are the two rights in Protocol 1, the right to property, and the right to education.¹⁰¹ In relation to these rights, because of the breadth of the wording both of the primary guarantees ('respect for private life') and of the exceptions to them (the 'protection of 'morals', or 'the rights of others'), it is generally not possible to argue that they mandate particular outcomes in particular circumstances. This is because these rights are under-determinate; that is, open to a range of plausible interpretations. John Griffith memorably described paragraphs 1 and 2 of Art 10 as 'the statement of a political conflict pretending to be a resolution of it.'¹⁰² Examples of this conflict abound in the sharply differing answers given by Strasbourg and the US Supreme court on numerous key free speech questions: whether inciting racial hatred is protected speech;¹⁰³ whether public figures are entitled to protection from non-malicious libels;¹⁰⁴ whether the state may punish or prevent prejudicial media reportage of criminal trials.¹⁰⁵ As Richard Mullender has observed, these general rights are what the philosopher Michael Waltzer would term 'thin' universalisable principles;¹⁰⁶ the 'thick' precepts, the concretized principles, lie in the case law. Therefore, to apply these rights without their case law is to apply general principles

¹⁰¹ Art 12 gives the right to marry, subject to state law. It is not much used and has generated little case law.

¹⁰² J. A. Griffith, 'The Political Constitution' (1979) 42 MLR 1, 14.

¹⁰³ Yes, according to the US Supreme Court: *R.A.V. v St Paul*, 505 US 377 (1992); *Virginia v Black*, 538 US 343 (2003); no, according to Strasbourg: *Jersild v Denmark* (1994) 19 EHRR 1.

¹⁰⁴ No (US Supreme Court): *New York Times v Sullivan* (1964) 376 US 254; yes (Strasbourg): *Lingens v Austria* (1986) 8 EHRR 407.

¹⁰⁵ Yes (Strasbourg): *Worm v Austria* (1997) 25 EHRR 557; no (US Supreme Court): *Nebraska Press Association v Stuart* 427 US 539, 549 (1976).

¹⁰⁶ R. Mullender, 'Tort, Human Rights, and Common Law Culture' (2003) 23 OJLS 301, 309-310, drawing on Michael Walzer' *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994).

only; it will only be extremely rarely, if at all, that the bare text of one of these rights will *itself* plainly demand a specific change to the common law – leading the courts inexorably to a particular destination, as opposed to amounting to generating a push, even a strong one, in a general direction of travel. As Mullender puts it, ‘the relevant [Convention] right, while a powerful reason for action, is also (to use Waltzer’s phrase) an invitation to more work’.¹⁰⁷ The Convention rights themselves, as opposed to the Strasbourg jurisprudence, are therefore only capable of functioning in the private sphere as broad values, or principles, rather than hard-edged rights. Specific demands are likely to come only from the Convention case law, which is *not* binding: according to the plain terms of section 2(1) HRA, courts must only take it ‘into account’. Thus, the fact that the HRA only makes the *rights* binding, not the Strasbourg case law,¹⁰⁸ in practice therefore empties out most of the concrete content of any theoretically *absolute* obligation – imposed on courts by stronger models – to develop domestic law compatibly with Convention rights.

This finding is particularly significant in relation to Article 8, which has the strongest (partly realised) potential for horizontal applicability. Absent the Strasbourg case law however, it is not clear that Article 8 requires state intervention in private relations at all. Article 8(2), it will be recalled, states that there shall be no ‘interference *by a public authority*’ with the right to respect for private life except in pursuit of the stated exceptions.¹⁰⁹ If one wants to argue that States must not only refrain from active ‘interference’ with privacy but also intervene to offer positive protection to individuals against interference by private actors, then one will need the Strasbourg jurisprudence to make that case water-tight: the text of the Article itself does not plainly impose such

¹⁰⁷ Mullender, *ibid.*, 11.

¹⁰⁸ See e.g. *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47.

¹⁰⁹ Emphasis added.

an obligation.¹¹⁰ In short, the horizontality of Article 8 flows from the positive obligations doctrine in the Strasbourg jurisprudence, not the bare text of the Article.

There are two possible counter-arguments to the above. The first points out that the courts are still bound to act compatibly with the Convention rights under section 6(1). In theory, this could lead to the courts expanding on the Convention's requirements as expounded in the Strasbourg jurisprudence and deciding for themselves, for example, that Article 8 required a particular intervention in the private sphere, even though Strasbourg had made no such finding. Given that the horizontal applicability of Art 8 would thenceforth be determined by looking not to the non-binding Strasbourg jurisprudence but instead to the courts' *domestic* interpretation of that Article, the courts would have effectively broken free of the Strasbourg jurisprudence and themselves determined a particular concrete requirement in the private sphere. We would concede in reply that this is possible, but in practice unlikely to happen more than occasionally. The courts are unlikely to find specific obligations in the Convention rights that have not been laid down at least fairly clearly in the Strasbourg case-law.¹¹¹ As Lord Hope has put it, 'it is not for us to search for a solution which is not to be found in the Strasbourg case-law. It is for the Strasbourg court, *not for us*, to... determine what further extensions, if any, are needed to the rights guaranteed

¹¹⁰ It was in *X and Y v The Netherlands* (1986) 8 EHRR 235 that Strasbourg held that Art 8 could require such intervention by states, a ruling that has been refined by numerous other authorities including *Von Hannover v Germany* (2005) 40 EHRR 1.

¹¹¹ While the House of Lords in *Campbell* (n 12 above) did anticipate a *clear* Strasbourg finding that Article 8 required protection against media intrusion in domestic law, Phillipson has argued elsewhere that this result is best explained as generated by specific circumstances and unlikely to be repeated. There were also strong indications by then that the Strasbourg jurisprudence was heading in the direction taken in *Campbell*, as confirmed shortly after by the decision in *Von Hannover (ibid)*. See further Phillipson, 'Privacy and Breach of Confidence', n 1 above, esp. 000-000.

by the Convention.’¹¹² Moreover, while *in theory* domestic courts could seek to use general Strasbourg principles to ‘find’ positive obligations outside the limited areas recognised by Strasbourg, its positive obligations doctrine, as we noted above, is patchy, meagre and lacking any general theory,¹¹³ with the result that domestic courts lack usable general principles that might allow them to innovate to any meaningful degree by branching out in a new direction in this area. It is true that it is *open* to the courts to do so: as Baroness Hale remarked in *Animal Defenders*, there is nothing ‘*to prevent* the courts from developing the common law... to a greater extent than the Convention and its jurisprudence currently require...’.¹¹⁴ However, we believe that our ‘third level’ general constitutional principles once again come into play here: judges who were faced with an argument that they should extend the obligations derived from the Convention rights into the private sphere beyond those required by Strasbourg would be most unlikely to do so in a way that required them to go beyond incremental development of the law.

Second, it might be argued that our rights-jurisprudence distinction relies on too sharp a distinction between sections 6(1) and section 2(1) HRA, such that we advance a misleading view of the HRA under which the courts have a duty to act compatibly with the Convention rights, but merely to ‘take into account’ Strasbourg jurisprudence. Such a critic would point out that the courts never have approached their section 6(1) task, whether in public or horizontal situations, by deciding *de novo* what the Convention rights mean, while merely ‘noting’ the Strasbourg view. Rather, the courts have accepted that the duties to act compatibly with the rights and to consider Strasbourg

¹¹² *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296, [25] (emphasis added).

¹¹³ See note 35 above.

¹¹⁴ *Animal Defenders* [2008] UKHL 15, [53] (emphasis added).

jurisprudence run hand-in-hand. As Lord Bingham put it in *Ullah*,¹¹⁵ ‘the correct interpretation of [the Convention] can be authoritatively expounded only by the Strasbourg court.’ In general, the courts accept that the Convention means what Strasbourg says it means,¹¹⁶ if only because they would otherwise risk placing the UK in breach of the Convention in international law.¹¹⁷

In response, we accept of course that this is the general approach of the courts. But our key point remains: the courts have never held themselves bound slavishly to follow *all particular Strasbourg decisions*. Rather, they have left themselves various exit routes from the so-called ‘mirror principle’. Importantly therefore, following Strasbourg decisions is a *general practice*, not a strict obligation, meaning that courts remain free to decline to follow a particular judgment that would require a result they believe would be mistaken or inconsistent with basic constitutional principles such as the separation of powers.¹¹⁸ There are examples of specific refusals to follow Strasbourg decisions,¹¹⁹ and other instances in which the House of Lords has in effect refused to follow Strasbourg while pretending obedience.¹²⁰ And it is also now clear that the courts *must* decline to follow Strasbourg decisions where these are inconsistent with domestic post-HRA precedents of the House of Lords or Supreme Court on the interpretation of Convention rights, even where the Strasbourg decision was decided *after* the domestic

¹¹⁵ *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20].

¹¹⁶ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [26] (Lord Slynn). The most striking recent instance is the Supreme Court decision in *Re McCaughey* [2011] UKSC 20, in which the Court, in order to give effect to a change in the Strasbourg approach to the procedural requirements of Article 2, departed from the relatively recent House of Lords decision in *Re McKerr* [2004] UKHL 12; [2004] 1 WLR 807. For a recent re-statement of the ‘mirror’ principle see *Manchester City Council v. Pinnock* [2010] UKSC 45; [2010] 3 W.L.R. 1441, at [48].

¹¹⁷ See Lord Bingham in *Animal Defenders*, n 114 above, [37].

¹¹⁸ *Alconbury*, n 116, [76].

¹¹⁹ *Horncastle*, n 108 above.

¹²⁰ *Animal Defenders*, n 114 above is the clearest example. The Lords declined to follow *VgT*, n 35 above, while making a very weak argument that another case, *Murphy v Ireland* (2003) 38 EHRR 212, was more relevant.

precedent in question.¹²¹ In short, there can be no absolute obligation to give effect to the Convention rights *as constituted by the Strasbourg case-law* in domestic law: for that to be so, the courts would need to be bound always to follow all principles laid down in the Strasbourg case-law in all circumstances, which is demonstrably not the case.

Our overall conclusions on the issues considered in this section are therefore as follows. First, some rights (Arts 6 and 7) can only bind state actors; others (Arts 2-5) are highly likely to be already catered for by existing domestic tort and criminal law. In relation to Articles 8-11, the obligation to give effect to the Convention rights would, without their jurisprudence, in most cases be devoid of specific content in the private sphere – one that would in practice beat the air. Once it is accepted that concrete content requires the Strasbourg jurisprudence, it cannot sensibly be argued that the courts have an absolute obligation to give effect to that content. In practice, we contend therefore that the practical potential for the horizontal applicability of the Convention rights is at once more limited than many have contended, and in relation to the most important rights, transforms into an *obligation* only to apply broad principles, with a general *practice* of applying the specific rules deriving from the Strasbourg case-law.

D. EXPOUNDING THE CONSTITUTIONAL CONSTRAINT MODEL

We now come to the full exposition of what our model means and its practical implications. There are three steps here. First, we show how our model provides an economical way of expressing what have previously been analysed as three different ‘moderate’ models in its single proposition. Second, we expand upon our thumbnail

¹²¹ *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 WLR 570. See further Young, chapter 2 in Hoffman, above. For the latest case in the saga, see *Birmingham City Council v Frisby* [2011] UKSC 8; [2010] 2 A.C. 39.

sketch of ‘incrementalism’. Third, we consider the implications of our model for the crucial issue of common law precedent.

The model as a distillation of other moderate interpretations

This section involves a closer look at Alison Young’s sevenfold typology of indirect horizontal effect noted above.¹²² We have already discounted some of the models: (A), which retreats from the pre-HRA position, and (B), which fails to advance on it, are too weak.¹²³ As seen above, model (E) is internally inconsistent and in any event is too strong, as is model (G), which equates to Wade’s ‘full indirect’ view. The remaining models are therefore (C), (D) and (F). In our view, despite the formal distinctions between them, they are similar in substance and reduce, essentially, into the single proposition that underlies the constitutional constraint model. Not only does this immunise our work from potential claims that we have failed to consider other viable constructions of the courts’ duty; given that we have discounted the other models along the spectrum as untenable, it also confirms the constitutional constraint model – the position into which models (C), (D) and (F) converge – as the best reading of that duty.

Under model (C), which Young calls ‘strong/weak indirect horizontality’, the courts are obliged to develop the common law compatibly with Convention values. Model (D) (‘limited strong indirect horizontality’) requires courts to develop the common law compatibly with Convention *rights*, but only by incremental development. Superficially, models (C) and (D) therefore differ in two respects: model (D) requires development consonantly with *rights* as opposed to values, and model (D) contains the express proviso that common law development be only *incremental*. Given our

¹²² See n 39 above.

¹²³ *Ibid.*

arguments above, however, the first ‘difference’ readily falls away. There is little practical distinction between ‘rights’ and ‘values’ in the present context because in practice the relevant horizontally applicable Convention rights are likely to operate under the HRA as principles or values – that is, as *reasons* for making a decision rather than hard-edged rights – anyway.¹²⁴ The second apparent ‘difference’ – incremental development – is also more apparent than real. Given that the Convention articles function as ‘values’ rather than ‘rights’ under model (C), they can evidently be outweighed by countervailing factors such as common law or constitutional principles. Implicitly therefore, model (C) courts would not regard themselves as bound to ‘distort’ existing causes of action by automatically supplanting them with Convention norms. Like model (D) courts, they would pause to consider instead whether the common law could accommodate the type of modification sought by the private litigant in the case at hand or whether it would best be achieved by Parliament through legislation. Models (C) and (D), in short, are fundamentally in harmony by their joint emphasis on the court’s obligation to develop the common law compatibly with the Convention so far as is possible by only incremental development.

This leaves model (F), under which the courts must develop the common law compatibly with Convention rights *and* can create new causes of action in order to ensure Convention-compatibility, but only ‘when this development is merely an incremental development of the common law.’¹²⁵ Like models (C) and (D), the underlying feature of model (F) is that courts are required to develop the common law but no more than incrementally. We have already indicated that it is a mistake, in our view, to rule out an obligation to create new causes of action as the end point in a

¹²⁴ See the well-known distinction drawn by Ronald Dworkin between rules and principles: *Taking Rights Seriously* (London: Duckworth, 2nd impression, 1978).

¹²⁵ Young, n 39 above, 40.

process of incremental development. Thus, models (C) and (D), which focus on incremental development, are best read as allowing also for the incremental creation of new causes of action. Courts under each of the three models might effectively develop the law into a new cause of action over time, and may choose to rename the new cause of action to reflect its new content. Precisely such a step seems to have been taken by the courts in recent cases by referring to the Art 8-inspired extended breach of confidence action as a tort of ‘misuse of private information’.¹²⁶ But the name given to the cause of action is merely semantic, and has no bearing on the courts’ ability to guarantee Convention protection in practice. As Keene LJ stated early on in the post-HRA development of the breach of confidence action:

‘Whether the resulting liability is described as being for breach of confidence or for breach of a right to privacy may be little more than deciding what label is to be attached to the cause of action.’¹²⁷

Briefly to summarise then, models (C), (D) and (F) can all be seen as reducing into the single proposition that the courts must develop the common law compatibly with the Convention save where to do so would involve more than incremental development. It is this single proposition that we term the constitutional constraint model.

The foregoing has allowed us to distil a variant of indirect horizontal effect that sits between Phillipson’s ‘weak’ model, under which the courts must have regard to

¹²⁶ See e.g. *Campbell*, n 12 above, [14] (Lord Nicholls).

¹²⁷ *Douglas v Hello!* [2001] QB 967, 1012. This, of course, is what happened subsequently: see Phillipson, ‘The “right” of privacy in England and Strasbourg compared’, in A. T. Kenyon and M. Richardson, *New Dimensions in Privacy Law* (Cambridge: CUP, 2006).

Convention values when developing the common law, and what (as explained above) we see as an overly strong reading of Hunt's model, under which the courts must ensure Convention-compliance whenever there is reliance on an existing common law cause of action. We have already explained how our model differs from even the better reading of Hunt that we explored above. The constitutional constraint model also differs clearly from Phillipson's previous 'weak indirect' model: under the constitutional constraint model the Convention principles *always* function as what Phillipson previously termed 'fundamental mandatory principles'; that is, principles which the court must consider *and* which presumptively prevail unless displaced by countervailing factors – in this case, the constitutional constraint.¹²⁸ Our model thus *requires* courts to develop the common law, subject only to incrementalism. Under Phillipson's previous model, by contrast, the Convention values enjoy no general presumptive weight over other factors; their weight depends instead on context-specific considerations such as the extent to which the private claimant in the given situation has voluntarily surrendered their autonomy to the defendant, and whether the private defendant wields 'state-like' power capable of generating state-like interferences with the claimant's Convention rights.¹²⁹ Hence, under the weak model, judges are only required to consider and weigh Convention values against countervailing factors,¹³⁰ *any one of which* might be found to outweigh the Convention. Under the constitutional constraint model however, only the requirement of incrementalism may prevail.

Incrementalism, discretion and judicial policy

¹²⁸ Phillipson, n 18 above, 832.

¹²⁹ *Ibid*, 846-847. This is why Young refers to his model as 'strong/weak indirect horizontality' (note 39 above, at 40-41).

¹³⁰ *Ibid*, 830.

Our purpose in this section is not to ‘defend’ the concept of incrementalism as such. Our overall argument is that incrementalism represents a fundamental constitutional constraint on the developmental activities of judges, and that logically it must also constrain the judges’ developmental obligation under s 6 because it has not been displaced by the HRA. In other words, it is not a concept we have *chosen* to constrain the s 6 duty, but simply one that we have *identified* as necessarily still present, given the terms of the HRA and the constitutional context. The HRA does not overtly seek to define incrementalism or offer any guidance as to how it should operate in this context, however. This is a distinct and difficult issue which will require further work in future, but we offer some initial thoughts here. In particular, we argue that judicial common law discretion, which incrementalism is designed to curb, is in fact more controlled in the HRA context than in the common law generally.

We begin with a broad sketch of incrementalism. In this context it will operate at what we call the second level of the horizontal effect analysis: once the courts have decided that the Convention itself requires some change in domestic law (first level), incrementalism will constrain the courts when they move to the second-level consideration of whether they can *effect* that change through common law development. Traditionally the courts have seen their role as extending no further than *applying* rather than *creating* law, by ‘interpreting’ statutes and ‘declaring’ or prospectively ‘unmasking’ common law rules. But it is now generally accepted that this ‘fairy tale’ view conceals the true nature of judicial activity. As many writers have argued,¹³¹ judges necessarily engage in some degree of law-*making* when interpreting statutes or developing the common law. In novel factual scenarios where existing

¹³¹ Kavanagh, n 71 above, 263-264; J. Bell, *Policy Arguments In Judicial Decisions* (Oxford: OUP, 1982), 94; J.C.S. Reid, ‘The Judge as Law Maker’, (1972-1973) 12 J.S.P.T.L. (N.S.) 22; A. Lester, ‘English Judges as Law Makers’ [1993] PL 269.

precedents do not strictly bind, judges must decide whether to extend or distinguish those precedents,¹³² justifying their choice by reference to latent or ‘deep’ principles deriving from the corpus of law in question or broader constitutional norms.¹³³ The correct distinction between the role of Parliament and the courts, then, is not between ‘creating’ and ‘applying’ law – a distinction which in many cases is ‘difficult if not impossible to discern’¹³⁴ – but instead between *legislative* and *judicial law-making*. This important, if broadly-drawn, distinction answers to the need for courts to ‘reconcile their desire to reform the law or to meet new circumstances with the constitutional position of the legislature.’¹³⁵

At the heart of the distinction is the notion that judicial law-making is much more restricted than the legislative kind. Unlike legislators, judges ‘cannot approach a legal question in a purely forward-looking way’;¹³⁶ they must ‘look back at and take account of the pre-existing legal frameworks and standards set out by Parliament and previous judges.’¹³⁷ The need for judges to have regard to the decisions of higher courts as authoritative expositions of common law principle is a significant aspect of the requirement of incrementalism; even judges not strictly bound by particular precedents must nevertheless give them ‘serious consideration’, providing ‘good reason and strong justification’ for distinguishing or overruling them.¹³⁸ By contrast, Parliament is ‘entitled to make law simply on the basis that [it thinks] it to be... beneficial and [is]

¹³² *Ibid.*, 267.

¹³³ *Ibid.*, 263-264. There are strong echoes here of Dworkin’s theory of adjudication: n 124 above.

¹³⁴ Kavanagh, *ibid.*, 270.

¹³⁵ Bell, n 131 above, at 94.

¹³⁶ Kavanagh, n 71 above, 271.

¹³⁷ *Ibid.* This backward looking aspect corresponds of course to Dworkin’s notion of the requirement of ‘fit’: n 124 above.

¹³⁸ Kavanagh, n 71 above, 273.

entitled to create new frameworks or radically alter existing ones'.¹³⁹ Moreover, whilst Parliament may decide to reform an entire area of law in a single sweep, judges, limited largely by the 'bivalent' context of litigation¹⁴⁰ and their own lack of expertise on general policy¹⁴¹ cannot, and will produce only *obiter dicta* if they stray beyond the particular case. As Bagshaw puts it:

'...procedures appropriate for the resolution of a bipolar dispute deeply anchored to a specific set of facts are not equally suitable for the drafting of rules suitable for application across a wide range of future cases. For example, detailed evidence relating to policy concerns, or about the frequency with which particular fact patterns are encountered, is rarely presented in court, and even less rarely *generated* for the purposes of bipolar litigation.'¹⁴²

In short, common law courts can only 'engage in partial and piecemeal reform', which is effected incrementally, 'by extending existing doctrines, adjusting them to changing circumstances or introducing small alterations to avoid an injustice in their application'.¹⁴³ The courts have characterised the limits on their powers of common law development in this way in a number of decisions.¹⁴⁴

As for how this general concept will bear out in this particular context, the constraint of incrementalism must plainly undergo some fine-tuning according to the more precise interplay between the deeper constitutional norms which combine to

¹³⁹ *Ibid*, 271.

¹⁴⁰ *Ibid*., 272.

¹⁴¹ *Ibid*., 273.

¹⁴² n 59 above, 000 (emphasis original).

¹⁴³ Kavanagh, n 71 above, 272.

¹⁴⁴ See e.g. *Sutherland Shire Council v Heyman* 60 ALR 1, 43-44 (Brennan J), cited with approval in *Caparo v Dickman* [1990] 2 AC 605, 633-634 (Lord Oliver); *Malone v Metropolitan Police Commissioners* [1979] 1 Ch 344, 372 (Sir Robert Megarry V-C).

produce it. One matter of particular importance is the role of policy considerations in the judicial resolution of hard cases. If judges make law, it follows that they exercise political power when they do so,¹⁴⁵ by ‘giving direction to society’ through the creation of rules which are formed following a judgement about the ‘fairness and social consequences’ of the decision.¹⁴⁶ The closer the qualitative nature of the decisions made by the courts and Parliament, the greater the risk becomes of the courts usurping Parliament’s constitutional role. The greater becomes the need, therefore, for incrementalism to limit the *extent* to which the courts can effect their political decisions by developing the common law. If judicial and legislative policy decisions are similar *in kind*, it becomes particularly pressing that judges develop the law cautiously, piecemeal, drawing on clear, pre-existing principles.¹⁴⁷ This is especially true given that judicial law-making, unlike the legislative kind, has retrospective effect.¹⁴⁸

Bell’s taxonomy of adjudicative models is helpful here. He characterises the normal role of English common law courts as that of ‘interstitial legislators’¹⁴⁹ with the ability to make open-ended judgements, similar in kind to those made by Parliament, about the best way to proceed in hard cases *all things considered*.¹⁵⁰ Here, the courts’ role is distinguished from Parliament’s only by the much more modest *scale* of the changes courts can make. He also describes a different model, the Dworkinian ‘rights

¹⁴⁵ Bell, n 131 above, 7-8. Kavanagh, a defender of a fairly muscular judicial role in public law, also insists that judicial law-making does not take place ‘outside’ or ‘above’ politics, but as a particular aspect of political power: *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP, 2009) at 9.

¹⁴⁶ Bell, *ibid.*, at 7.

¹⁴⁷ *Ibid.*, 19.

¹⁴⁸ *Ibid.*

¹⁴⁹ See ch. 9.

¹⁵⁰ The model bears strong similarities with Karl Llewellyn’s ‘Grand Style’ of adjudication: see Bell, 227 and for discussion, W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicholson, 1973), Ch. 10.

model',¹⁵¹ under which the courts' role is specifically restricted to defining and protecting individual rights between disputing parties. Under this model the nature of judicial political decisions is thus more distinct,¹⁵² and the risk of the courts usurping Parliament's democratic role decreases. Under the rights model the requirements of incrementalism might therefore be somewhat more relaxed, giving judges greater room to innovate (using pre-existing principles) when developing the common law.

Our view is that the courts' role under the HRA will sit somewhere between these two models. When dealing with absolute rights, or even with narrowly qualified ones, the courts' role neatly fits the rights model, for obvious reasons. But when adjudicating upon the generally qualified rights (8-11), the Convention appears to mandate neither a purely rights-based nor interstitial legislator approach. Arts 8-11 exhibit what Mullender terms "qualified deontology":¹⁵³ whilst they purport to uphold a set of rights established regardless of consequences, paragraph 2 of each article allows for their restriction by reference to consequentialist considerations ('legitimate aims'), provided that there is a pressing social need to do so and the restriction is proportionate. Generally qualified rights therefore require the courts to decide when community interests demand that rights be curtailed. In principle, therefore, the courts' role in such cases involves more than simply defining and protecting individual rights.

We then, however, have to bring into consideration the critical role of the Strasbourg jurisprudence. Once this is considered, it becomes clear that the courts' capacity to make policy decisions in Convention cases will be considerably more constrained than when engaging in ordinary common law adjudication. This is because,

¹⁵¹ The model rests on Dworkin's theoretical distinction between principle and policy, on which see R. Dworkin, 'Political Judges and the Rule of Law' (1978) 64 *Proceedings of the British Academy* 259, 261.

¹⁵² See Bell, n 131 above, especially Ch. 8.

¹⁵³ See R. Mullender, 'Theorising the Third Way: Qualified Consequentialism, the Proportionality Principle and the New Social Democracy', 27(4) *Journal of Law and Society*, 493-516.

as discussed above, when deciding upon the *concrete requirements* of the Convention rights, domestic courts normally follow Strasbourg under section 2 HRA.¹⁵⁴ So the role of domestic courts in Convention-based cases, even hard ones, is not simply to decide how best to proceed, all things considered. It is not even to decide what is the most morally attractive reading of the Convention rights,¹⁵⁵ and of the balance to be struck between those rights and their societal restrictions. Domestic courts do not simply make their own *de novo* decision, for example, as to whether Articles 2 and 8 confer a right to assisted suicide¹⁵⁶ or whether respect for private life requires legal recognition of a new gender identity.¹⁵⁷ Instead, as the judges have read it, the HRA effectively instructs the courts to exercise their political discretion by deciding such questions according to *Strasbourg's* principles and to depart from these only in exceptional circumstances.¹⁵⁸ The judges' scope to decide policy issues is therefore (a) confined to policy issues raised by the rights themselves, and is thus not at large; and (b) sharply limited, even in deciding these issues, by section 2 HRA. Naturally there will be cases where the courts decline to follow Strasbourg, at least completely. Currently, for example, the courts appear reluctant fully to implement Strasbourg's finding in a number of decisions from *Von Hannover*¹⁵⁹ onwards that Article 8 is normally engaged when photographs are taken without consent.¹⁶⁰ But such cases are likely to be quite rare. There will also be instances where it is not clear what the Strasbourg

¹⁵⁴ See above, 000-000.

¹⁵⁵ As a Dworkinian judge would, albeit subject to the requirements of 'fit': n 124 above.

¹⁵⁶ *R (Pretty) v Director of Public Prosecutions* [2001] UHL 61, [2002] 1 AC 800.

¹⁵⁷ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, applying *Goodwin v United Kingdom* (2002) 35 EHRR 447.

¹⁵⁸ These principles will also extend, broadly, to the determination of what restrictions on the right are necessary in a democratic society under paragraph 2 of the generally qualified rights. The courts' general approach does not translate into an absolute obligation to follow *all* Strasbourg decisions however, as we emphasised above: 000-000.

¹⁵⁹ [2005] 40 EHRR 1.

¹⁶⁰ Phillipson, 'Privacy and Breach of Confidence', n 1 above. at 00-00.

jurisprudence requires, leaving judges some interpretative freedom to construe it.¹⁶¹ Again, our conclusion nevertheless holds: despite the seemingly open-ended issues raised particularly by the generally qualified Convention rights, the courts' ability to act as 'interstitial legislators' in Convention-based hard cases is relatively limited.

What are the implications of this for the tightness of the incrementalism constraint? We are now at level two of the horizontal effect analysis: once the courts have decided that the Convention requires something not already catered for by the common law, they must decide whether the change required can be achieved incrementally, or whether it is legislative in character and should be left to Parliament.¹⁶² We have already dismissed the weak indirect horizontal effect model because it requires courts simply to *consider* the Convention at this point,¹⁶³ and argued that the Convention rights will function instead as *fundamental mandatory principles*, which presumptively prevail. They can be overridden only if the countervailing considerations – in this context, the particular considerations which cause the judges to doubt in a given case that they can protect the Convention through incremental development – are sufficiently strong. Since incrementalism is a broad principle and will often involve a matter of fine judgement, it will inevitably sometimes be a matter of legitimate debate as to whether a proposed change is incremental or not. What we can say, however, is that by treating the Convention's requirements as fundamental mandatory principles the constitutional constraint model requires doubt to be resolved

¹⁶¹ In particular, Strasbourg's role is essentially declarative: its judgments state whether or not domestic law breaches the Convention, but not, in general, the specific steps required to deal with the problem (see R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: developing a "municipal law of human rights" under the Human Rights Act' (2005) 54 ICLQ 907, 915-918.) Hence, when implementing such jurisprudence in the common law, courts *will* inevitably exercise their own judgement in devising the details of a re-developed cause of action and appropriate remedies under it: this is a level-two issue, however.

¹⁶² Above, 000-000.

¹⁶³ See above, 000-000.

in favour of developing the law. In other words, to refuse to make the necessary developmental change, judges must have *strong reason* to believe that developing the law would amount to legislative change and thus go beyond their proper constitutional role.

The implications for precedent

Plainly, the hard edge of the constitutional constraint is the domestic doctrine of precedent. There are two species of precedent in this context. The first is *post-HRA* precedent. As noted above, the House of Lords has held that lower courts must follow the precedent of higher domestic courts, rather than conflicting Strasbourg rulings, if the relevant domestic rulings were delivered after the entry into force of the HRA.¹⁶⁴ It is therefore clear that domestic courts would be constrained, under any model of horizontal effect, by post-HRA precedents impeding the development of the common law in a Convention-friendly fashion. This leaves, second, the issue of *pre-HRA* domestic precedent, a more difficult question that has received relatively little attention.¹⁶⁵ It seems clear that domestic courts must at least be *empowered* to overturn any pre-HRA common law precedents which would otherwise prevent the development of the common law compatibly with the Convention. If this were not so, section 6 would impose no positive developmental duty on the courts, which is a possibility we have already discounted. By contrast, under the ‘strong’ models we have considered, the courts would be *required* always to override pre-HRA Convention-incompatible

¹⁶⁴ *Kay v Lambeth LBC*, n 121 above. Cf. *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, where it was suggested that in the event of a clash between a Court of Appeal precedent and a later Strasbourg precedent on an aspect of the Convention’s interpretation, a future Court of Appeal could decide which to follow.

¹⁶⁵ T. Raphael, ‘The problem of horizontal effect’ [2000] EHRLR 493, 505, leaves the point open; Beyleveld and Pattinson argue that the courts must *always* override pre-HRA precedents where a Convention right requires it: n 3 above, 644.

precedents, since otherwise they would be failing in the duty to afford a Convention remedy regardless of the existing content of the common law.

The constitutional constraint model sits between these two positions. Since courts under our model are required to develop the common law compatibly with the Convention within the bounds of incrementalism, this in turn *requires* rather than merely *empowers* them to override pre-HRA Convention-incompatible precedents up to that point. But because of the constraint of incrementalism, the courts' duty to override Convention-incompatible precedent would not go as far – as under the full horizontal effect model, for example – as requiring them to override *any and all* Convention-incompatible precedent.¹⁶⁶

To explain this point more fully, we stress, first, that there is nothing necessarily 'legislative' rather than 'judicial' in the act of overturning or overruling an existing precedent, as when the Supreme Court overrules existing precedents established by the House of Lords, or lower courts, for instance. One might accuse courts of flouting the doctrine of precedent if they overrule higher precedents without good reason – without a clear Convention reason – but this is a different criticism and is not something we envisage. Secondly, we stress that whilst the doctrine of precedent is an important constitutional principle, there is nothing necessarily constitutionally improper with inferring from the HRA a duty to adjust the doctrine in the circumstances which we have outlined. Indeed, as the House of Lords demonstrated in 1966 by unilaterally departing from its earlier ruling to the effect that it was bound by its own decisions,¹⁶⁷ the English doctrine of precedent is better conceived of as a judge-made and therefore

¹⁶⁶ See Beyleveld and Pattinson (*ibid.*).

¹⁶⁷ See the *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, overruling *London Tramways v London City Council* [1898] AC 375.

self-imposed *discipline*, rather than a strict rule of law.¹⁶⁸ Its purpose is to ensure that the *principles* underlying judicial decisions are articulated and applied consistently to similar cases in future,¹⁶⁹ in the interests of justice. In turn, as noted above, this safeguards the core rule-of-law value of legal certainty by requiring that common law development takes place in a broadly predictable way. Hence, it is the underlying principles which produce what the judges regard to be the ‘just’ outcome in a given case; the doctrine of precedent has an ancillary and more facilitative role as the presumptively most effective way of delivering a just outcome in subsequent cases.¹⁷⁰

Third, then, it should be emphasised that the doctrine of precedent, whose purpose in this context is to guarantee consistency in the application of *pre-HRA* common law principle, automatically loses its binding force when major new constitutional norms – Convention principles – are thrown into the mix by the HRA. The introduction of these principles calls for a reassessment by the court, having due regard to the Convention, of how best to strike the balance between the various competing principles relevant to the case in order to ensure a just outcome. This does not imply that the Convention *must always* now be preferred, but it does displace the precedent-premised presumption that justice will be most effectively delivered by straightforwardly applying *pre-HRA* judgments. In these circumstances, the earlier case provides a reason for deciding the later one in that way, but not ‘a conclusive reason’.¹⁷¹

¹⁶⁸ For fuller discussion see A. Gearey, W. Morrison and R. Jago, *The Politics of the Common Law: Perspectives, Rights, Processes and Institutions* (London: Routledge, 2009) chapter 3, esp. 75-78.

¹⁶⁹ For classic statements to this effect see Lord Mansfield’s judgment in *Jones v Randall* (1774) 1 Cowp 37, 98 E.R. 954 and, more recently, B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 33-34.

¹⁷⁰ ‘Presumptively’ because, as the 1966 *Practice Statement* illustrates, there may be pressing situations where justice is best served by *departing* from precedent. See further Lord Denning, *The Discipline of Law* (London: Butterworths, 1979), 292.

¹⁷¹ A. Kavanagh, ‘Defending deference in public law and constitutional theory’ (2010) LQR 222, 233. Kavanagh’s remark was made in relation to the doctrine of precedent in the House of Lords but we regard it as relevant here, too.

We would observe, fourthly, that this view already appears to have found some judicial recognition in the case law. *Dicta* in certain horizontal effect cases indicate a clear view that section 6 upsets the existing hierarchy of precedent in the private common law with the result, inevitably, that that lower courts *may* disregard the precedent of higher courts for the purposes of bringing the common law into line with the Convention.¹⁷² In *A v B plc*, for instance, Lord Woolf CJ remarked that '[judicial] authorities which relate to the action for breach of confidence prior to the coming into force of the 1998 Act...are largely of historic interest only.'¹⁷³ More strikingly still, in the High Court in *Venables and Thompson*,¹⁷⁴ Butler-Sloss P dramatically demonstrated this approach by stating that the advent of the HRA had propelled the courts into 'a new era', before issuing a reporting injunction *contra mundum*, which represented a departure from 200 years of case law, in order to protect the Convention rights of the claimants.

We finish with two final points of guidance. First, because judicial law-making requires judges to develop the law in a piecemeal fashion from existing principle as expounded in earlier cases, judges will be unable to develop the common law in a Convention-friendly fashion under the constitutional constraint model if there is either a lack of relevant common law principle from which to develop,¹⁷⁵ or a strong presence of contrary or 'negative' common law principle. Second, the constitutional constraint model requires judges to distinguish on the one hand between common law 'precedents' (which, as we have argued, do not necessarily impede the development of the common law if negative), and common law 'principle', on the other. As evidenced by the frequent practice in lower courts of scrutinising the reasoning and principles

¹⁷² This view also finds favour in academic writing: see e.g. Beyleveld and Pattinson, n 3 above, 644; Raphael, n 165 above, 506.

¹⁷³ [2003] QB 195, [9].

¹⁷⁴ *Venables and Thompson v News Group Newspapers* [2001] 1 All ER 908, 916, [100]. We are indebted to Raphael for this example.

¹⁷⁵ One example would be *Kaye v Robertson* [1991] FSR 62.

underlying the rulings of higher courts in order to decide for themselves whether to distinguish or extend the application of pre-existing precedents, this is a task to which judges are already well accustomed. An important distinction exists between a decision – even of the House of Lords or Supreme Court – which is weakly reasoned from principles only faintly detectable in the common law, and one which represents the natural and straightforward application of a fundamental principle that may pervade not only the context of the case in question but other areas of domestic law, too. It is only by paying close attention to the substance of the decision in question that judges will be able to decide whether or not overriding it so as to safeguard the Convention will amount to a breach of their constitutional duty to develop the principles of the common law in a judicial rather than legislative fashion. We have suggested that only where the judges have strong reason to believe that it would fall into the forbidden territory of ‘legislative-style’ change should they should hold back.

CONCLUSION

Although the constitutional constraint model sits between existing models, we would stress that we are not ‘trimmers’ intent on carving out a mid-way position for argument’s sake.¹⁷⁶ The constitutional constraint model draws on deep constitutional norms to emphasise that the obligation under section 6 HRA to develop the common law will inevitably be limited by the need for judges to do so incrementally. It has not been our principal argument, but we also believe that the model will be instinctively appealing to the judiciary. While the judges appear to have ruled out the more extreme versions of no or full horizontal effect, they have not collectively felt able to endorse any particular model of indirect effect. At times there have even been *dicta* actively

¹⁷⁶ See C. Sunstein, ‘Trimming’ (2008-2009) 122 Harv L.R. 1049.

predicting that no resolution of the issue by the courts is to be expected.¹⁷⁷ There could be many prosaic reasons for this, not least that the point has probably not been argued in full before the House of Lords or Supreme Court. But we suggest tentatively that another reason may be because, as we have argued above, none of the models so far advanced draw on background constitutional fundamentals, including those of particular concern to the judiciary, such as the rule of law. Instead, authors have concentrated on the Act – and sometimes the Convention rights also – in isolation from the constitutional backdrop. The judges have perhaps instinctively recognised this, and refused collectively to pin their colours to any so-far-proffered academic mast. Our arguments provide a new model, whose virtue lies not in being radically different in *outcome* from some of the more moderate models advanced – indeed, we argue that it better captures the essence of several of them – but in being much more fully expounded, and having deep foundations in those constitutional norms underlying the UK constitution that have been previously overlooked in this context. It is time for this issue to be resolved, more than ten years after the advent of the HRA.

¹⁷⁷ *Kay v Lambeth LBC* [2006] 2 WLR 570, [61] (Lord Nicholls); *X v Y* [2004] ICR 1634, [45].